assignment is to the government, the name of the assignee may be used in a suit even at law.[1] No assignment which transfers the rights of seamen in prizes,[2] or savors of maintenance or any illegality is a valid consideration.[3] The maker of a note waives no defence, which existed prior to its assignment, by his promise to the assignee to pay it.[4]*

Cincinnati, O. E. L. P.

RECENT AMERICAN DECISIONS.

In the Circuit Court of the United States, Western District of Pennsylvania. November Term, 1853.

GARRET VAN METTER *vs.* ROBERT MITCHELL.

An action lies at Common Law in a free State by the owner of a fugitive slave, against one who knowingly harbors and conceals the latter; and the Act of Congress of 1793, has not destroyed this right. Jones *vs.* Van Zandt, 2 McLean, 603, dissented from.

This was a motion in arrest of judgment.

The opinion of the Court was delivered by Judge IRWIN.

The declaration contains two counts for damages for injuries, in substance as follows: "That a certain negro, called Jared, who, by the laws and customs of Virginia, was held to service and labor in that State, by the plaintiff; on the first of September, 1845, left the said service and labor, fled, and escaped into the Western District of Pennsylvania; that he was pursued by the plaintiff, with the intent of recapturing him; but that the defendant, well knowing the premises, and with the intent of preventing the plaintiff from arresting the fugitive, and removing him to Virginia, concealed and harbored him, thereby enabling the said fugitive to escape from the labor and service to which he was lawfully held, by means of which, his said labor and service became totally and entirely lost to the

[1] Moore, 701; S. C. Cro. Eliz. 633; United States *vs.* Buford, 3 Peters, 13.

[2] Usher *vs.* De Wolfe, 13 Mass. 290.

[3] Prosser *vs.* Edmunds, 1 You. & Col. 481; Mouldsdale *vs.* Birchall, 2 W. Bl. 820.

[4] 1 Ala. N. S. 626.

* We shall publish the second part of this article in our next number.

plaintiff." The jury having given a verdict for the plaintiff, I will assume the facts just stated to have been fully proved.

The declaration does not conclude against the form of the statute of the 12th of February, 1793, respecting persons escaping from the service of their masters; nor does it refer to it in any manner, and for this omission a motion is made in arrest of judgment.

Can the action be maintained without this conclusion or reference; or, in other words, can an action be supported at Common Law for the injuries complained of?

The fourth section of the Act of 1793, which imposes a penalty of five hundred dollars for knowingly rescuing, harboring or concealing a fugitive from labor, concludes with this clause: "Saving, moreover, to the complainant, his right of action for, or on account of said injuries, or either of them."

What right of action is meant by this clause? Does it arise from, and is it limited to the clause itself, so that whatever may be the condition of the fugitive—whether he owes service and labor as a slave, a servant for a term of years, or an apprentice—is it necessary, in case of such injuries as the jury have found, to proceed under the statue, and not at common law? The question can only be truly answered by going beyond the statute of 1793; for if there was no remedy for the injuries contained in the fourth section of that Act until the time of its passage, there was then, no vitality in the constitutional provision on the subject of fugitives from labor, or in so much of the judicial Act of 1789, which confers jurisdiction in the Courts of the United States to give relief for injuries "according to law and usage," until the 12th of February, 1793. Such a construction, it is conceived, is not warranted by the letter or spirit of either constitution or law. The clause in the constitution is in the following words: "No person held to service or labor in one State, under the laws thereof, escaping into another State, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due."

A claim in a judicial sense, is a demand of some matter as of right made by one person upon another, to do, or to forbear to do

some act or thing, as a matter of duty; and where an act is required, the means are given to make effectual the right, which is seldom possible by a mere delivery to the owner of the fugitive. Before the Act of 1793, as well in this as in other instances, this injustice has been but too frequent. The fugitive might have been concealed, harbored and assisted to escape into a foreign country, so that his services might not only have been partially, but totally lost to the owner. I cannot believe that such injustice could have been without remedy.

The claim to a fugitive from labor is a controversy arising under the constitution, under the express delegation of judicial power given by that instrument; and the Courts of the United States, under the Judiciary Act of 1789, have "all the powers necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law," which principles and usages are those of the common law. *U. S.* vs. *Burr*, Ap. 2d part, 186. In the case of *Johnson* vs. *Thompson*, Judge Baldwin, in delivering the opinion of the Court, says: "This right of the master results from his ownership, and the right to the custody or ownership of the slave *by the common law*, and eleventh section of the Abolition Law of Pennsylvania, and other laws of that State;" and in the same case he further says—"The Constitution of the State and Union is not and the source of those rights. They existed in their plenitude before any constitutions; which do not create, but protect and secure them against any violation by the Legislatures or Courts, in making, expounding and administering laws." If this opinion of the Court is sound—and I do not see how it can be regarded otherwise—it follows, that if there had been no constitutional provision or statute for the recaption and delivery of fugitives from labor, the owner of an escaped fugitive would have had a remedy by action for damages in the Court of a State into which he had fled and was harbored, or in a Court of the United, if either had common law jurisdiction. And in the case *Penn* vs. *Burr*, *et. al.*, Add. Rep. 326, it was objected by the defendants' counsel, that a master could not give authority by advertisement to take his runaway apprentice, "as an Act for the regulation of apprentices points out a particular pro-

ceeding in case of absconding apprentices." But the Court decided "that the Act of Assembly does not change the common law, but gives further remedy." This last decision is precisely in point, as it cannot be doubted that the words "fugitives from labor," in the Act of 1793, extends to apprentices as well as to slaves. From principle and authority thus far, I am fortified in the opinion that damages may be recovered for injuries of the nature contained in the plaintiff's declaration at common law.

In the case of *Jones* vs. *Vansandt*, 2 McLean, 603, however, which was an action for damages for harboring and concealing a fugitive from labor, the plaintiff among several counts under the Act of 1793, inserted one at the common law which became important, from several of the former having been abandoned, and a finding for the plaintiffs upon two other, including the latter. On a motion for a new trial which was ordered, Judge McLean said, that "the defendant is charged with harboring slaves of the plaintiff who had escaped from his service in Kentucky. But the wrong charged is no legal wrong, except it is made so by statute, and the fourth count does not refer to the statute, which is a public one, and the only foundation of the plaintiff's right;" and in another part of the learned Judge's opinion, he says: "It is clear that the plaintiff has no common law right of action for the injury complained of." This decision, from the learning and eminent standing of the Judge who made it, is entitled to the highest respect; and in a doubtful case, I should have mistrusted my own judgment in differing from him. The opinion incited deeper reflection, and if possible deeper conviction, that the conclusion I have arrived at is the law, and indeed, as if to fortify this conclusion, Judge McLean himself has said in the same case, that "the statute creates the right and declares what shall constitute the wrong, and for redress of every wrong the common law gives a remedy by action for the injury done." If this is true in a case where the statute creates the right, it cannot be disputed in a case where the right existed prior to the statute, and which, so far from taking away only serves to confirm. The words "saving moreover to the person claiming such labor and service, his right of action for or on account of the said injuries, or

either of them" must be construed to mean to preserve, to spare, or to retain a right existing anterior to the statute. Certainly the words "saving *his* right," in the absence of negative words, cannot mean to take away a right; they are the appropriate words, in a statute which gives a new remedy, but which intends at the same time to reserve a pre-existing right; by the new remedy a party may take his election to proceed upon the statute, or at the common law. The saving clause in the statute is cumulative, and in affirmance of the common law.

Motion in arrest of judgment is therefore overruled, and judgment must be entered upon the verdict.

In the Court of Appeals, State of New York.

GATES *vs.* BROWER.

In an action for certain horses sold and delivered, it appeared that the defendant's wife had bought the goods, and given her own note for them; and that she had previously, and generally acted as his agent; and that he had made no objection to the purchase, but had used the horses as his own: held that there was evidence to go to the jury, of the husband's liability, notwithstanding the Married Women's Acts of New York.

This was an action to recover the value of a span of horses sold and delivered on the 5th day of October, 1848.

It appeared on the trial that the wife of the defendant bought the horses of the plaintiff, and gave her note for them, and that she had previously acted as the agent for her husband. The statement of the case appears in the opinion of the Court. The Supreme Court held that the defendant was not liable. The Court of Appeals reviewed the decision, and ordered a new trial.

Graves & Wood, for Appellant, cited 1 Esp. 142; 4 Wend. 465; 4 Barb. 222; 6 T. R. 176; 8 Mass. 336.

O. Vandenburgh, for Respondent.

MASON, J.—I think there was evidence in this case which should have been submitted to the jury to determine whether these horses were not in fact purchased by the wife acting in behalf of the defendant, and whether the purchase was not in fact his. There was